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IN THE

Supreme Court of the United States

October Term, 1963

No. 245

MILTON BERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

IRWIN L. GERMAISE,
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New York 7, N. Y.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Milton Berman, petitioner herein, prays that a rehearing be granted herein upon the decision of this Court dated June 22, 1964, affirming the Judgment of the Court below. This decision was as follows:

[June 22, 1964]

"PER CURIAM.

The judgment of the Court of Appeals for the Second Circuit is affirmed. *United States* v. *Robinson*, 361 U. S. 220."

Said decision was rendered by a closely divided Court, four Justices dissenting. Petitioner can do little more than

respectfully request this Court to refer to dissenting opinion of Mr. Justice Black, in which the Chief Justice and Associate Justices Douglas and Goldberg concurred.

During the oral argument of this case, questions from the bench adverted to the dictum in *United States* v. *Robinson*, 361 U. S. 220 (1961), at page 230 note 14 that:

> "there are a number of collateral remedies available to redress denials of basic rights. Examples are: . . . the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U. S. C. § 2255; and proceedings by way of writ of error coram nobis."

In response to said questions, counsel for petitioner urged that considerations of judicial economy should prevail, to avoid the necessity of a new proceeding under 28 U. S. C. § 2255 or 28 U. S. C. § 1651(a). Counsel then had no case to cite in support of such proposition. At this time, counsel urges that this Court reconsider its decision in the light of reasoning and language in *Heflin* v. *United States*, 358 U. S. 415 (1958) at page 418, footnote 7, as follows:

> "7. Since the motion under Rule 35 is made in the original case, the time within which review by certiorari of the Court of Appeals decision should be sought is 30 days. Supreme Court Rule 22(2), 28 U. S. C. A. The petition for writ of certiorari in this case was not filed until after the passage of 30 days from the judgment below. Nevertheless, because successive motions may be made under Rule 35 and because no jurisdictional statute is involved, the majority agrees to dispense with the requirements of our Rule in order to avoid wasteful circuity." • • •

The grant of full relief to petitioner, either directly by this Court upon certiorari, or by reinstatement of the first or second appeal in the Court of Appeals below, would

"avoid wasteful circuity" as was noted by this Court in the *Heflin* case, *supra*. Resort to collateral attack also involves risks of exposure of the defendant to additional problems, including the Government's contention, by letter to this Court following argument, that collateral proceedings may not be available to petitioner to correct the Constitutional errors he could raise in a timely appeal. Petitioner does not concede validity of the Government's argument, but is concerned about this problem in view of the uncertainty of this point, particularly uncertainty of the current meaning and validity of the dictum of the *Robinson* case, *supra*, quoted hereinabove.

Petitioner has maintained that the judgment of conviction infringed petitioner's rights under the Fourth Amendment inasmuch as it made use of evidence which should have been suppressed as the product of an illegal search and seizure. The trial Court's opinion, denying the motion to suppress by reason of the consent of petitioners' landlord (reproduced in Appendix C to Petitioner's Petition for Certiorari, pp. 4a-5a), clearly was invalid in the light of *Jones* v. *United States*, 362 U. S. 257 (1960) and *Chapman* v. *United States*, 365 U. S. 610 (1961). This illegality extended to Exhibit 9, an unsigned statement which the jury specially found to be involuntary, since such statement was unquestionably the product of an illegal search and seizure. *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

Since the trial jury made a special finding of fact that the said Exhibit 9 was not voluntary (R. pp. 570-571), it is submitted that the judgment of conviction was plainly invalid. The statement, Exhibit 9, as read to the jury (460-472) plainly was a confession. Having found the statement not to be voluntary, the jury could not be competent to determine the petitioner's guilt on the basis of evidence which included said Exhibit, notwithstanding limiting instructions previously given to the jury. *Spano*

v. *People of New York*, 360 U. S. 315, 321-324 (1959); *Jackson* v. *Denno*, — U. S. — (decided June 22, 1964), 73 U. S. Law Week 4620.

CONCLUSION

For reasons set forth above, this Court should grant a Rehearing to Petitioner, and upon Rehearing, should reverse the judgments of the Court below and remand for appropriate proceedings.

Dated: July 17, 1964.

Respectfully submitted,

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